IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

BRENDA D. CHURCH, fka Brenda D. Slavin, Plaintiff, v. ONEWEST BANK FSB, a Federal Savings Bank, dba IndyMac Bank, Defendant.	No. CV-10-1057-HU FINDINGS & RECOMMENDATION

Howard M. Levine
James F. Marron
SUSSMAN SHANK LLP
1000 S.W. Broadway, Suite 1400
Portland, Oregon 97205-3089

Attorneys for Plaintiff

Christopher J. Kayser
William L. Larkins, Jr.
LARKINS VACURA LLP
621 S.W. Morrison Street, Suite 1450
Portland, Oregon 97205

Attorneys for Defendant

HUBEL, Magistrate Judge:

Plaintiff Brenda Church brings this debt collection action

against defendant OneWest Bank, FSB. Defendant moves to dismiss the action, contending that plaintiff's claims are preempted and/or exclusively reserved for the Bankruptcy Court. Defendant alternatively requests that the action be stayed. I recommend that the motion to dismiss be denied except as to the claim brought under 15 U.S.C. § 1692e(2)(A). I further recommend that the alternative motion to stay be denied.

BACKGROUND

The facts are as alleged in the Complaint. In 1998, plaintiff executed a promissory note and security agreement in favor of defendant, in order to finance her purchase of a manufactured home. Compl. at ¶ 5; Exh. 1 to Compl. The residence was encumbered by a lien, which was recorded with the State of Oregon Department of Consumer and Business Services in a statement of "Status of Manufactured Structure Ownership." Compl. at ¶ 6; Exh. 2 to Compl.

In August 2005, plaintiff filed a Chapter 13 bankruptcy proceeding. Compl. at ¶ 13; see Exh. 12 to Compl. (July 26, 2010 letter from plaintiff's bankruptcy attorney to defendant reciting history of Chapter 13 filing by plaintiff). On November 30, 2005, plaintiff filed a Second Modified Chapter 13 Plan ("the Plan"), pursuant to which defendant's lien was valued at $50,600. Exh. 12 to Compl. The Plan provided for a post-confirmation interest rate and a series of periodic payments. Id.

On December 27, 2006, plaintiff's bankruptcy counsel filed a secured Proof of Claim in the amount of $50,600 on behalf of defendant. Id. The claim reflected the value of the home as determined by the Plan. Id. The Chapter 13 Trustee, Brian Lynch, made payments to defendant as required by the Plan, with the final

payment made on October 30, 2009. Id.

On or about December 3, 2009, defendant mailed plaintiff a letter notifying plaintiff that

> "IndyMac Mortgage Service, a division of OneWest Bank FSB, is currently servicing your loan on behalf of securitization trust MHD 1998-2, BANK OF NEW YORK, as Trustee/Master Servicer and is sending you this important notice as required by federal law. As of the date of this letter, you owe a balance of $24,246.09."

Compl. at ¶ 8 (quoting December 3, 2009 letter attached as Exhibit 3 to Complaint).

On December 28, 2009, plaintiff responded to defendant's December 3, 2009 letter. Compl. at ¶ 9; Exh. 4 to Compl. There, plaintiff stated:

> Please be advised that I am in Chapter 13 Bankruptcy, Case #305-40414-RLD13, and as of this date, I am unable to verify the balance due. The Chapter 13 Trustee has been making the home mortgage payments for the past several years. By copy of this letter to the Trustee, I respectfully request that said Trustee respond to this letter as appropriate. In addition, I request that IndyMac Mortgage Services allow additional time for Trustee's response, beyond the thirty day period after receipt of your notice.

Exh. 4 to Compl.

On December 31, 2009, the Bankruptcy Court entered a "Chapter 13 Order Re: Discharge of Debtor(s) and Order Discharging Trustee and Closing Case." Exh. 12 to Compl. On January 4, 2010, Lynch, the Chapter 13 Trustee, sent a letter to IndyMac confirming the payments and provided IndyMac with documentation concerning the Chapter 13 case together with a complete disbursement history showing the date and the amount of each payment. Id.

Nonetheless, defendant continued to take actions to collect the debt from plaintiff. Compl. at ¶ 10. These actions included continued mailings showing amounts due, threatening to foreclose on

the residence, and leaving a note on her doorknob requesting she contact defendant for "programs available to homeowners like you." Id.; see also Exh. 11 to Compl. (copy of notice left on doorknob).

Plaintiff's bankruptcy counsel, who represents her in this action as well, wrote to defendant to demand that defendant stop its efforts to collect the debt. Compl. at ¶ 11; Exh. 12 to Compl. After defendant received that letter, defendant repeatedly called, and as of the date the Complaint in this case was filed, continues to call, plaintiff regarding the alleged debt. Compl. at ¶ 12.

On August 31, 2010, plaintiff filed a complaint in the Bankruptcy Court seeking relief due to defendant's alleged violation of the Discharge Order and Automatic Stay. Id. at ¶ 14.[1]

DISCUSSION

Based on the facts recited above, plaintiff brings two claims: a claim under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 - 1692p (FDCPA), and a claim under Oregon's corollary statute, the Oregon Unfair Debt Collection Practices Act, Oregon Revised Statute §§ (O.R.S.) 646.639 - 646.643 (OUDCPA). In support of the FDCPA claim, plaintiff contends defendant violated the statute in the following ways:

(1) contacting plaintiff at an unusual time or place, or at a

---

[1] Although plaintiff did not attach a copy of the bankruptcy filing to the Complaint in this case, she has attached a copy of it to her response to the motion to dismiss. It is properly considered in resolving this motion. Coto Settlement v. Eisenberg, 593 F.3d 1031, 1038 (9th Cir. 2010) (on a motion to dismiss, court may consider materials incorporated into the complaint including when contents of document are alleged in a complaint, the document's authenticity is not in question, and there are no disputed issues as to the document's relevance).

time or place known or which should be known to be inconvenient to plaintiff, in violation of 15 U.S.C. § 1692c(a)(1);

(2) contacting plaintiff directly after being advised that she was represented by counsel, in violation of 15 U.S.C. § 1692c(a)(2);

(3) contacting plaintiff after being notified to cease further communications, in violation of 15 U.S.C § 1692c(c);

(4) falsely representing the character, amount, or legal status of the alleged debt, in violation of 15 U.S.C. § 1692e(2);

(5) failing to disclose in the initial written communication with plaintiff that the debt collector was trying to collect a debt and that any information would be used for that purpose, in violation of 15 U.S.C. § 1692e(11); and

(6) failing to issue an appropriate validation notice, in violation of 15 U.S.C. § 1692g.

Compl. at ¶ 19.

In support of her OUDCPA claim, plaintiff contends that defendant violated that statute by

(1) communicating with plaintiff repeatedly or continuously at times known to be inconvenient to that person with intent to harass or annoy the debtor, in violation of O.R.S. 646.639(2)(e), and

(2) communicating with plaintiff without clearly identifying the name of the debt collector, the name of the person, if any, for whom the debt collector was attempting to collect the debt, and the debt collector's business address on all initial communications, in violation of O.R.S. 646.639(2)(h).

Compl. at ¶ 26.

Defendant contends that this action must be dismissed because

the Bankruptcy Code provides the exclusive remedy for claims relating to a discharged debt and thus, the Bankruptcy Code preempts plaintiff's claims.[2]

Ninth Circuit and Ninth Circuit Bankruptcy Appellate Panel (BAP) cases make clear that the Bankruptcy Code "preempts substantive state law claims and remedies for alleged misconduct that occurs in connection with a bankruptcy case." Chaussee, 399 B.R. at 232. In Chaussee, the debtor had previously filed a Chapter 13 bankruptcy and had a repayment plan confirmed. Nonetheless, a claimant later filed two unsecured proofs of claim in the debtor's bankruptcy case. The debtor then filed an adversary proceeding complaint against the claimant in the bankruptcy case, alleging that the claimant violated the FDCPA and Washington's Consumer Protection Act (CPA), by filing the two proofs of claim when the debtor did not owe the debts and which she contended were barred by the statute of limitations.

The claimant moved to dismiss the FDCPA and CPT claims, contending that the Bankruptcy Code preempted the CPA claim and precluded the FDCPA claim. The bankruptcy court denied the motion,

---

[2] The "preemption doctrine has its roots in the Supremacy Clause of the United States Constitution . . . and is implicated only when there is a conflict between federal and state regulations. . . Under this doctrine, state laws interfering with, or contrary to, federal law are preempted." In re Chaussee, 399 B.R. 225, 230 (9th Cir. BAP 2008) (footnote and citation omitted). Thus, technically, defendant's argument is properly termed one of "preemption" to the extent it is addressed to the OUDCPA claim, but it is considered a "preclusion" argument to the extent it is addressed to a federal law. See Walls v. Wells Fargo Bank, N.A., 276 F.2d 502, 511 (9th Cir. 2002) (referring to "preclusion" of FDCPA claim). The argument, while carrying a slightly different moniker, is essentially the same.

but the Ninth Circuit BAP reversed, concluding that the debtor could not bring the separate claims. The BAP discussed earlier Ninth Circuit cases and noted that in each one, "the factual predicate for the state law claim hinged upon the alleged wrongful conduct of a party in a bankruptcy case. . . . [T]he prebankruptcy relationship of the parties as debtor and creditor was of no discernable import to the courts in reaching their decisions." Id. at 233 (citing In re Miles, 430 F.3d 1083 (9th Cir. 2005) (wrongful conduct targeted the creditor's alleged bad faith filing of an involuntary petition under Bankruptcy Code § 303 which provides express remedies in the event the bankruptcy court determines that the petition was wrongfully filed and dismissed); In re Bassett, 255 B.R. 747 (9th Cir. BAP 2000) (alleged wrongful conduct was based upon a defective reaffirmation agreement), rev'd on other grounds, 285 F.3d 882 (9th Cir. 2002); MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910 (9th Cir. 1996) (alleged wrongful conduct arose in connection with the bankruptcy claims process)).

Similar to the earlier cases it cited, the Chaussee court explained that, in the case before it, the "factual foundation of Debtor's allegations is, solely, that in filing of proofs of claim in the bankruptcy court, [the claimant] violated the state consumer protection laws." Id. As in the earlier cases, the Bankruptcy Code and its attendant implementing rules provided the exclusive remedies should the creditor's conduct be determined to be wrongful. Id. The court concluded that

> [c]onsistent with the teachings of our circuit's case law, we fear that the purposes of and policies of the [Bankruptcy] Code, together with the need for its uniform application, may be undercut if debtors can pursue state law claims under the CPA against those accused of filing

an improper proof of claim.

Id. at 234.

The Chaussee court then rendered the same conclusion as to the FDCPA claim. The court noted that the debtor relied on 15 U.S.C. § 1692f(1) in support of her FDCPA claim, which prohibits the collection of any amount unless the amount is expressly authorized by an agreement creating the debt or permitted by law. Id. at 234-35. The court discussed another Ninth Circuit case, Walls, which involved an FDCPA claim based upon an alleged discharge violation. Id. at 235-36. The court found Walls analogous and concluded that "where the [Bankruptcy] Code and [Bankruptcy] Rules provide a remedy for acts taken in violation of their terms, debtors may not resort to other state and federal remedies to redress their claims lest the congressional scheme behind the bankruptcy laws and their enforcement be frustrated." Id. at 236-37. The court noted that unlike a non-binding and contrary case decided by the Seventh Circuit where the debtor's FDCPA claim against the creditor was based upon the creditor's actions taken after conclusion of the bankruptcy case, the FDCPA violation in the instant case targeted the act of filing a proof of claim in the actual pending bankruptcy case. Id. at 237 (citing Randolph v. IMBS, Inc., 368 F.3d 726 (7th Cir. 2004). Thus, "[a]pplication of the FDCPA to this conduct would certainly conflict with the [Bankruptcy] Code." Id.

In the Ninth Circuit, Chaussee makes clear that a bankruptcy debtor may not bring state or federal consumer protection claims as part of an adversary proceeding in the bankruptcy case to the extent the resolution of those claims is intertwined with procedures contemplated by the Bankruptcy Code and Rules. And,

Walls makes equally clear that even if the consumer protection claims are brought in a separately filed action outside the bankruptcy court, the same concerns are triggered.

In Walls, the plaintiff had filed a Chapter 7 bankruptcy in 1997 with a debt to Wells Fargo discharged in January 1998. 276 F.3d at 505. Nonetheless, through a "ride-through" arrangement, the plaintiff continued to make payments on the debt, both before and after the debt was discharged. Id. Under such an arrangement, Wells Fargo retained its lien on the property. Id. The plaintiff stopped making payments and the bank foreclosed on the property in December 1998. Id. The plaintiff then filed an action in federal district court in which she contended that Wells Fargo violated 11 U.S.C. § 524 which provides that discharge under Title 11 of the Bankruptcy Code operates as an injunction against collecting debt as a personal liability of the debtor. She contended that the bank's continued solicitation and collection of monthly payments was prohibited by section 524. Id. She further contended that the activity was an "unfair and unconscionable means of collecting a debt under the FDCPA." Id.

The district court granted Wells Fargo's motion to dismiss the action and the Ninth Circuit affirmed. The court first held that there was no private right of action under section 524. Id. at 507-10. The court noted that under 11 U.S.C. § 105(a), civil contempt remedies allowed an aggrieved debtor to obtain compensatory damages, attorney's fees, and the offending creditor's compliance with the discharge injunction. Id. at 507. No further remedy was necessary. Id. The court explained that for the court to imply a private right of action under section 524 would

"undercut the complex, detailed, and comprehensive provisions of the lengthy Bankruptcy Code . . because it has an enforcement mechanism for violations of § 524 via the contempt remedies available under § 105(a)." Id. at 509 (internal quotation omitted).

Next, the court addressed plaintiff's FDCPA claim which was based on section 1692f(1), prohibiting the collection of any amount unless the amount is expressly authorized by the agreement creating the debt or permitted by law. Id. at 510. This is the same FDCPA provision that was alleged in Chaussee. The plaintiff in Walls argued that the bank engaged in unfair and unconscionable collection practices forbidden by the FDCPA by trying to collect her debt in violation of the discharge injunction. Id. She argued that this was outside the bankruptcy proceeding because the bankruptcy was over and the FDCPA was needed to protect a debtor who has been discharged. Id.

The court rejected the plaintiff's argument. It explained:

> There is no escaping that Walls's FDCPA claim is based on an alleged violation of § 524. As the district court noted, this necessarily entails bankruptcy-laden determinations. Were her payments "voluntary" under § 524(f)? Was she required to enter into a reaffirmation agreement pursuant to § 524(c)? How much of a free ride did her "ride through" under Parker afford? The Bankruptcy Code provides its own remedy for violating § 524, civil contempt under § 105. To permit a simultaneous claim under the FDCPA would allow through the back door what Walls cannot accomplish through the front door - a private right of action. This would circumvent the remedial scheme of the Code under which Congress struck a balance between the interests of debtors and creditors by permitting (and limiting) debtors' remedies for violating the discharge injunction to contempt. . . . Nothing in either Act persuades us that Congress intended to allow debtors to bypass the Code's remedial scheme when it enacted the FDCPA. While the FDCPA's purpose is to avoid bankruptcy, if bankruptcy nevertheless occurs, the debtor's protection and remedy

remain under the Bankruptcy Code.

Id. (citation omitted).

Under Walls, consumer protection claims which "necessarily entail bankruptcy-laden determinations" are preempted or precluded, even when they are brought in a separate civil action and even when the bankruptcy is concluded. When Walls and Chaussee are read together, it is clear that state or federal consumer protection type claims cannot be maintained, whether as part of a bankruptcy proceeding or post-bankruptcy civil action, to the extent that resolution of those claims requires interpretation of and determination under bankruptcy laws and rules.

Two post-Walls cases, one from this Court, indicate that there are, however, consumer protection claims which may still go forth, without implicating the concerns raised by Walls, Chaussee, and the cases cited therein. In Thomas v. U.S. Bank., N.A., No. CV-05-1725-MO, 2007 WL 764312 (D. Or. Mar. 8, 2007), the plaintiffs brought claims in federal district court under the federal Fair Credit Reporting Act (FCRA), Oregon's Unfair Trade Practices Act (UTPA), and OUDCPA. The claims were based on the defendant's having continued to report a VISA account debt to credit reporting agencies when that debt had been discharged in the plaintiffs' preceding Chapter 13 bankruptcy. On summary judgment, the defendant argued that the OUDCPA claim was preempted by the Bankruptcy Code under Walls. Id. at *9. Judge Mosman rejected the defendant's argument.

Judge Mosman noted that the specific OUDCPA provision relied upon by the plaintiffs was O.R.S. 646.639(2)(k) which prohibits the enforcement of a right or remedy with knowledge or reason to know

that the right or remedy does not exist. Id. He then explained that with that OUDCPA claim, the plaintiffs were "not directly alleging a violation of the bankruptcy discharge order." Id. He further explained that

> [i]n their first two complaints, their allegations on this point focused on the bank's attempt to collect a debt previously discharged in bankruptcy. However, apparently recognizing the preemption problem, in their second amended complaint the [plaintiffs] excluded all reference to their bankruptcy. Likewise, in response to the bank's motion for summary judgment, the [plaintiffs] argue the bank violated the [O]UDCPA by attempting to collect an obsolete debt.
>
> The bank argues the [plaintiffs] are trying to avoid preemption by putting a new label on the same facts. I disagree. Though the facts are similar, the basis of liability the [plaintiffs] are now focusing on has nothing to do with their bankruptcy discharge. They have alleged a completely different legal theory as to why the bank attempted to enforce a remedy it knew it had no right to enforce. This difference is evidenced by the fact that, unlike in Walls, resolving the [plaintiffs'] obsolescence argument does not "necessarily entail [] bankruptcy-laden determinations." Walls, 276 F.3d at 510. Thus, allowing the [plaintiffs] to proceed with this claim will not "circumvent the remedial scheme of the [Bankruptcy] Code," id., and bankruptcy preemption does not apply here.

Id.

In a more recent case from the Southern District of California, the plaintiff alleged, in a civil action in federal district court, that the defendants, through their attempts to collect on a debt that was discharged in bankruptcy, violated various provisions of the FDCPA and California's analogous debt collection practices statute. Goad v. MCT Group, No. 09cv1321 BTM (POR), 2010 WL 1407257 (S.D. Cal. Apr. 6, 2010). In its first decision in the case, the court, following Walls, granted the defendants' motion for judgment on the pleadings, holding that the FDCPA and state claims were precluded by the Bankruptcy Code

because the plaintiff's claims were premised on the defendants' violation of the discharge injunction. Id. at *1. In that decision, the court granted the plaintiff leave to file an amended complaint "to the extent that Plaintiff can plead violations of the FDCPA and [the state statute] that are independent of any violation of the discharge injunction." Id.

In the First Amended Complaint, the plaintiff alleged that defendants violated three provisions of the FDCPA: (1) section 1692f prohibiting use of unfair or unconscionable means to collect or attempt to collect a debt; (2) section 1692e(5) prohibiting debt collectors from threatening to take any action that cannot be legally taken, and (3) section 1692e(10) prohibiting the use of any false representation or deceptive means to collect a debt. Id.

Once again, the defendants moved for judgment on the pleadings arguing that the plaintiff's claims were premised on defendants' attempts to collect a debt that was discharged by the Bankruptcy Court. Id. at *2. Once again, the court agreed. Id.

The court explained that although the plaintiff had eliminated most of the original complaint's references to the 2007 discharge of plaintiff's debt in bankruptcy, it was still clear that the basis of the plaintiff's claim was that the defendants did not have the legal authority to collect on the debt and the debt was not actually owed because the debt had been discharged in bankruptcy. Id. The court noted that nowhere did the plaintiff's First Amended Complaint or the plaintiff's opposition papers contend that the debt was not owed for some other reason. Id.

The court stated that "[f]air debt collection claims that hinge upon whether the debt at issue was discharged or not are

precluded." Id. Discussing cases from other jurisdictions, the court explained that claims were precluded when the court would "have to decide whether the debt on the mortgage note had been discharged in bankruptcy" which would inappropriately require reference to the Bankruptcy Code and "interject" the court into "bankruptcy laden questions." Id. In the case before it, the court stated that the claims as presented in the plaintiff's First Amended Complaint "clearly depend on the legal status of Plaintiff's debt and would require the Court to determine whether the debt was discharged or not." Id. at *3. Thus, the claims were precluded. Id.

Finally, the court explained that nonetheless, not all fair debt collection practices claims are precluded because the debt at issue was discharged in bankruptcy. Id. "Claims that are independent of the bankruptcy discharge-i.e., claims that do not turn upon the discharged nature of the debt-would not interfere with the remedial scheme of the Bankruptcy Code." Id. As an example, the court noted that even if a debt were discharged, "the debtor could pursue claims against a debt collector who harassed the debtor my making incessant telephone calls, threatened or intimidated the debtor, or lied about matters (other than whether the debt is owed)." Id. These types of claims would not be precluded under the reasoning of Walls. Id.

In the instant case, defendant argues that Walls requires preemption of all of plaintiff's claims. Plaintiff contends that, as indicated in Thomas and Goad, her claims should not be preempted because resolving them requires no "bankruptcy-laden" decisions.

I agree with plaintiff, with one exception. Plaintiff alleges

several violations of the FDCPA, and two OUDCPA violations. Only one of these allegations requires a determination that the debt at issue in defendant's communications with plaintiff, was not valid. Under 15 U.S.C. § 1692e(2), it is a violation of the FDCPA to falsely represent the character, amount, or legal status of the alleged debt. Here, resolution of this claim depends on the legal status of plaintiff's debt, which is determined only by reference to the Bankruptcy Code. To analyze if defendant's actions constituted a false representation of the character, amount, or legal status of the debt requires a determination of whether the debt was properly discharged in plaintiff's Chapter 13 bankruptcy proceeding, and whether the post-bankruptcy collection efforts violated section 524's discharge injunction. Because this determination requires interpretation of the Bankruptcy Code, it is precluded. E.g., Necci v. Universal Fidelity Corp., 297 B.R. 376, 377-78, 381 (E.D.N.Y. 2003) (claim under section 1692e(2)(A) precluded).

However, none of the remaining FDCPA or OUDCPA claims depend on the Bankruptcy Code. As the Goad court explained, claims independent of the bankruptcy discharge should not be preempted or precluded because they do not interfere with the "remedial scheme of the Bankruptcy Code." Goad, 2010 WL 1407257, at *3. One example of such claims listed by the court in Goad includes one of the claims plaintiff brings here: harassing the debtor by making incessant phone calls. Aside from the 1692e(2) claim, plaintiff's remaining claims are similar. The validity of these claims does not rise or fall on the validity of the underlying debt.

Defendant suggests that the test is whether the debt

collection claims "relate" to the bankruptcy claims. I disagree. Under Walls, the correct question is whether resolution of the debt collection claims involves "bankruptcy-laden determinations." Here, other than the claim brought under section 1692e(2), the claims are independent of the Bankruptcy Code and may proceed separately in this case.

I further recommend that defendant's alternative motion to stay be denied. Precisely because the remaining claims in this case do not involve the validity of the debt at issue in the ongoing bankruptcy case, there is no need to stay this action pending the February 2011 trial scheduled in the bankruptcy case.

CONCLUSION

I recommend that the motion to dismiss [9] be granted in part and denied in part as follows: the motion should be denied except as to plaintiff's claim under 15 U.S.C. § 1692e(2)(A). I further recommend that the alternative motion to stay [9] be denied.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due February 7, 2011, If no objections are filed, then the Findings and Recommendation will go under advisement on that date.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

If objections are filed, then a response is due February 24, 2011. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

IT IS SO ORDERED.

Dated this 18th day of January, 2011.

/s/ Dennis J. Hubel

Dennis James Hubel
United States Magistrate Judge